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NO. 43188-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FREDERICK CARL DURGELOH,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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Assignment of Error

1. The trial court's acceptance of a stipulation that freed the state from proving an essential element on one of the charged offenses violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, because the defendant did not assent to the stipulation.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, when it refused to give his proposed lesser included instruction on unlawful display of a weapon.

3. The trial court violated RCW 9.94A.701(9) when it imposed sentences on counts I and II that exceeded the statutory maximum for each offense.

Issues Pertaining to Assignment of Error

1. Does a trial court's acceptance of a stipulation that frees the state from proving an essential element of the charged offense violate the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when the defendant did not assent to the stipulation?

2. Is unlawful display of a weapon a lesser included offense to second degree assault when a defendant leaves his or her home and goes to the area outside the back door and then brandishes a weapon at a person on the curtilage?

3. Does a trial court violate RCW 9.94A.701(9) if it imposes 120 months plus 18 months community custody on a class B felony?

STATEMENT OF THE CASE

Factual History

At about 10:00 pm on July 11, 2009, family members called "911" to say that the defendant appeared despondent and suicidal. RP 105-109.[1] Based upon this call, two Cowlitz County Sheriff's deputies responded to the defendant's home at 749 Carnine Road in rural Cowlitz County. RP 105-109, 156-162. The defendant's residence is a manufactured home that sits well back off the road and has a porch next to a sliding glass door, which functions as the main entrance and exit. RP 111-114, 156-162. The defendant has serious health problems, had recently had a leg amputated, and was wheelchair bound. RP 237-239. Once the deputies arrived, one went to the door and knocked a number of times without response. RP 111-114. After calling dispatch and noting that the defendant's truck was parked in the yard, one of the deputies again started knocking and saying that they were sheriff's deputies and just needed to talk to the defendant. *Id.*

Within a few minutes, the two deputies saw the defendant moving in his wheelchair towards the door with a pistol in his hands. RP 115-118, 159-162. The first deputy yelled a number of times for the defendant to put the

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[1]The record on appeal includes three volumes of continuously numbered verbatim reports of the jury trial held on July 26, 2011 to July 28, 2011, subsequent hearings held on September 12, 2011, January 6, 2012, and January 27, 2012, and the sentencing hearing held on March 2, 2012. They are referred to herein as "RP [page #]."

gun down. *Id.* When the defendant did not comply, the two deputies retreated to the yard where one took cover behind a truck and another took cover behind a car. *Id.* The defendant then rolled out of the residence onto the back porch, yelled that the officers were trespassing and that he was ordering them to leave. RP 119-128, 163-167. According to the officers, the defendant pulled the action back on the pistol, loaded a round in the chamber, waived the gun in their directions and made threats to kill them. *Id.* The defendant denied doing or saying anything of the sort, although he did admit that he had a pistol in his hand, that he was mad, and that he ordered the officers to leave. RP 239-246.

Within a few minutes the defendant entered the residence and then again came out on the back porch. RP 119-128, 163-167. According to the officers the defendant again pointed the pistol in their directions, although they agreed that because of the lighting he would not have been able to see where they were. *Id.* The officers also claimed that the defendant again ordered them to leave and threatened to kill them if they came to the porch area, after which he retreated back into the house. *Id.* In fact, while in the house, the defendant twice called "911" and ordered the dispatcher to tell the officers to leave his property. RP 207-213.

About this time other officers and a SWAT team arrived and surrounded the defendant's residence. RP 127-128, 168-169. After

negotiations over the phone the defendant left his pistol and ammunition on his bed and rolled his wheelchair out of the residence. RP 126-128. The police then placed the defendant under arrest and retrieved the pistol and ammunition from the defendant's bedroom. RP 129-131, 194-201.

Procedural History

By information filed July 15, 2009, the Cowlitz County Prosecutor charged the defendant Fred Carl Durgeloh with two counts of second degree assault while armed with a firearm and one count of second degree unlawful possession of a firearm. CP 4-6. The state later amended the charge and added two counts of felony harassment while armed with a firearm. CP 23-25. The case was continued a number of times over the next two years based upon the defendant's deteriorating health. CP 15-16, 17-18, 19-20, 37-38, 39-40, 41-42.

The case eventually came on for trial starting July 26, 2011, over the defendant's objection that his physical condition prevented him from fully participating because (1) he could not sit for more than an hour at a time without experiencing intense pain, and (2) his mental condition was affected by the Fentanyl patch that he used and the Oxycontin that he took every few hours when the Fentanyl patch was insufficient to manage his pain. RP 1-36. While the court denied the defendant's motion to continue, the court did allow the defendant to attend the trial sitting in a recliner, and offered to take

breaks in the proceedings as the defendant needed. RP 37-52.

During the trial, the state called four deputies, including the two who initially responded to the defendant's home. RP 100, 152, 180, 187. The state also played the audio recording of the defendant's 911 calls, after which it rested its case. RP 207. At this point, the state informed the court that the defendant was going to stipulate to the existence of the predicate offense underlying the unlawful possession of a firearm charge. RP 216. The following gives the prosecutor's statement along with the colloquy the court had with the defendant concerning the stipulation.

> MR. SMITH: The only evidence that the State remains to present is, the Defendant at this time, Your Honor, has elected to enter a stipulation regarding the predicate offense. I'll hand that up to the Court. It's been signed by both Counsel and by Mr. Durgeloh, the Defendant. And I know he's had an opportunity to discuss that with Mr. Wardle.
>
> (Prosecutor hands the document to the Judge.)
>
> JUDGE EVANS: Okay. So, Mr. Durgeloh, you've had an opportunity to talk about the stipulation of fact regarding the – a violation of a protection or no-contact order. And that you've been previously convicted of that. And do you have any questions about that?
>
> MR. DURGELOH: Just that it was my understanding that when we did that, that that was not in effect. And I thought that there was papers showing that, because my concern was that I still – well, I grew up being a hunter and a fisherman and I didn't want to lose my rights to be able to hunt.
>
> JUDGE EVANS: Okay. So you understand what this stipulation is saying, is that on July 11th, 2009, you'd been previously convicted

of a crime of either no-contact order or violation of a protection order? And that was a domestic violence offense that occurred after July 1st, 1993. Are you agreeing that that's accurate?

MR. DURGELOH: I – I don't remember, but yes.

JUDGE EVANS: Okay.

MR. SMITH: And Your Honor, just – just for the record –

JUDGE EVANS: Uh-huh?

MR. SMITH: – the – the guilty plea form from District Court does reflect that he was advised of the loss of rights. I think it's perfectly possible that he doesn't remember or recall that at this point, Your Honor, but that is what the record reflects.

JUDGE EVANS: Okay. And –

RP 216-217.

After this colloquy, the court read the written stipulation to the jury. RP 222-223; CP 49.

Following the close of the state's case, the defendant took the stand on his own behalf. RP 236-264. The court then instructed the jury with the defense taking exception to the court's refusal to give the defendant's proposed instruction on unlawful display of a firearm as a lesser included offense to the two assault charges. RP 51-58; RP 268-278. After argument and deliberation, the jury returned verdicts of "guilty" on each count charged, along with special verdicts that the defendant had committed the two assaults and the two felony harassments while armed with a firearm. RP 303-352;

356-361; CP 86-93.

Following a number of continuances the court sentenced the defendant to 120 months on Counts I and II plus 18 months community custody with all sentences to run concurrently. CP 107, 110-111; RP 369-375, 376-379, 380-382, 383-407. The defendant thereafter filed timely notice of appeal. CP 118.

ARGUMENT

I. THE TRIAL COURT'S ACCEPTANCE OF A STIPULATION THAT FREED THE STATE FROM PROVING AN ESSENTIAL ELEMENT ON ONE OF THE CHARGED OFFENSES VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, BECAUSE THE DEFENDANT DID NOT ASSENT TO THE STIPULATION.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove that (1) the defendant drove while

intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element that intoxication be a proximate cause of accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant in Count III with unlawful possession of a firearm with the disqualifying fact being a 1993 misdemeanor conviction for violation of a protection order. CP 24. Thus, in order to secure a conviction for this offense, the state had the burden of proving the fact of the prior conviction beyond a reasonable doubt. In this case, the prosecutor informed the court that the defendant and his attorney were going to stipulate to this essential element of the crime. Indeed, there is a written stipulation to this end signed by the defendant and his attorney.

However, when the court held a colloquy with the defendant on the waiver of his right to force the state to prove this essential element of the offense, the defendant's reply fell far short of an affirmation that he understood his constitutional rights on this matter and that he was knowingly, intelligently, and voluntarily waiving that right. The colloquy went as follows:

> MR. SMITH: The only evidence that the State remains to present is, the Defendant at this time, Your Honor, has elected to enter a stipulation regarding the predicate offense. I'll hand that up to the Court. It's been signed by both Counsel and by Mr. Durgeloh, the Defendant. And I know he's had an opportunity to discuss that with Mr. Wardle.
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> JUDGE EVANS: Okay. And –

RP 216-217.

In this colloquy the defendant only equivocally acknowledges that he had a prior conviction for violation of a no contact order and he certainly does not stipulate that it prohibited his continued possession of firearms. In this case the state may argue that the defendant's failure to object to the admission of this stipulation constitutes an implicit waiver, even given his confused responses during the colloquy. However, as the following argues, the defendant's failure to object cannot function as an implicit waiver of his constitutional right to force the state to prove each and every element of the offense charged. In fact, case law is clear that under our state and federal constitutions, a court must enter into a colloquy with a defendant who, during the colloquy, must clearly state the intent to waive a right secured under the constitution.

For example, our case law requires the court to engage in a colloquy with a defendant indicating a desire to waive the right to jury trial under

Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981) ("Because of the constitutional guarantee of trial by jury, the record must show that the waiver of a jury by the accused was knowingly, intelligently and voluntarily made.")

Similarly, the court must enter into a detailed colloquy with any defendant indicating a desire to waive the right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As with jury waivers, the waiver of the right to counsel must also be knowingly, voluntarily, and intelligently made. *State v. Harell*, 80 Wn.App. 802, 805, 911 P.2d 1034 (1996). Thus, if the court fails to hold a detailed colloquy with the defendant to assure that the waiver is knowingly, voluntarily and intelligently made, the record must clearly reflect that the defendant at least understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of a defense. *State v. DeWeese*, 117 Wn.2d 369, 377-378, 816 P.2d 1 (1991).

Our case law requires an even more detailed colloquy with a defendant indicating the desire to plead guilty. Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly,

voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

These cases stand for the proposition that, absent a sufficient record, the courts must indulge every reasonable presumption against finding the waiver of a constitutional right. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). For example, in *State v. Hos,* 154 Wn.App. 238, 225 P.3d 389 (2010), a defendant appealed her conviction for possession of methamphetamine following a bench trial, arguing that she had not knowingly, voluntarily, and intelligently waived her right to a jury trial. In this case, the defendant's attorney had brought an unsuccessful suppression motion, and then stated that the defendant wished to submit to a bench trial on stipulated facts in order to reserve the right to appeal the denial of the motion to suppress. The court then accepted the defense attorney's statement and found the defendant guilty upon a stipulation to facts presented by the parties. At no point did the defendant object. However, neither did the court

enter into a colloquy with the defendant concerning her right to trial by jury, and the defendant did not sign a written jury waiver.

On appeal, the state responded by arguing that (1) the defendant ratified her attorney's oral waiver of her right to jury trial by failing to object and (2) the error was not preserved for appeal because the defendant had not called the error to the trial court's attention. In addressing these arguments, the court first reviewed the decision in *State v. Wicke*, *supra*, noting as follows:

> To be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. Our Supreme Court upheld the Court of Appeals' reversal of Wicke's conviction following a bench trial because, although Wicke's trial counsel had stated on the record that Wicke waived his right to a jury trial, the record did not contain Wicke's personal expression of such jury trial waiver. Wicke had stood beside his counsel, without objection, as counsel orally waived a jury trial. But the trial court did not question Wicke about whether he had discussed a jury waiver with defense counsel and whether he had agreed to the waiver; nor did Wicke file a written jury trial waiver under CrR 6.1(a).

State v. Hos, 154 Wn.App. at 250-251 (citations and footnote omitted).

Based upon the holding in *Wicke*, the court then went on to reject the state's arguments, in spite of the fact that the defendant had stood by counsel and failed to object when her case was tried to the bench. The court stated:

> But here, as in *Wicke*, the record does not contain Hos's personal expression waiving her right to a jury trial. Hos did not sign a written jury trial waiver. Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily

> waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving. Because the record lacks Hos's personal expression of waiver of her constitutional right to a jury trial, Wicke requires that we reverse her conviction and remand for a new trial.

State v. Hos, 154 Wn.App. at 251-252.

In both *Hos* and *Wicke,* the court refused to find a waiver of the right to jury trial in spite of the fact that (1) the defendants stood by their attorneys in open court and said nothing when their attorneys informed the court that each defendant was waiving the right to jury trial, and (2) each defendant continued to say nothing when their cases were tried to the bench.

In the case at bar the colloquy the court had with the defendant falls short of demonstrating that the defendant understood that he was stipulating to an element of the offense charged, much less that he was acting knowingly, intelligently, and voluntarily. Thus, in this case, the trial court's action reading the stipulation to the jury violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should vacate the conviction for unlawful possession of a firearm and remand for a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE HIS PROPOSED LESSER INCLUDED INSTRUCTION ON UNLAWFUL DISPLAY OF A WEAPON.

It is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Thus, the failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn.App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, "[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed." *State v. Parker,* 102 Wn.2d 161, 166,

683 P.2d 189 (1984) (citing, *inter alia, State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the state charged the defendant in Counts I and II with second degree assault under RCW 9A.36.021(1)(c) pursuant to a factual allegation that the defendant committed the offenses by pointing a loaded pistol at two deputies while sitting in his wheel chair outside his house. Indeed, the state made this very argument to the jury during closing. Subsection of RCW 9A.36.021(1)(c) states as follows:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> . . .
>
> (c) Assaults another with a deadly weapon;

RCW 9.94A.021(1)(c).

Under RCW 9.41.270, a defendant commits the crime of unlawful display of a weapon as follows:

> (1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270(1).

In order to secure a conviction for second degree assault under RCW 9A.36.021(1)(c), the state has the burden of proving that the defendant

displayed a firearm with the specific intent to create reasonable fear and apprehension of bodily injury. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Our case law holds that this intent to create reasonable fear may be inferred from the intentional pointing a gun, but not from the mere displaying of a firearm. *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). By contrast, to secure a conviction for unlawful display of a firearm under RCW 9.41.270(1), the state must prove that the defendant merely displayed that firearm in a manner manifesting an intent to intimidate another or warranting alarm for another's safety. Thus, every second degree assault under RCW 9A.36.021(1)(c) includes the offense of unlawful display. As a result, unlawful display is legally a lesser included offense to second degree assault under RCW 9A.36.021(1)(c). *See State v. Fernandez–Medina*, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000).

In the case at bar, the defendant claimed that he rolled his wheelchair out his back door onto the porch area while holding his pistol in an attempt to get the officers to leave his property. Thus, he admitted to the offense of unlawful display, which would normally meet the factual requirement for use as a lesser included offense. However, while the trial court in this case did not dispute the factual claim, the court found that under the decision in *State v. Haley,* 35 Wn.App. 96, 665 P.3d 1375 (1983), the defendant was not entitled to the lesser included instruction because under RCW 9.41.270(3), his

location outside the house on the porch gave him an absolute defense to a charge of unlawful display. In fact, a careful review of this case reveals that the trial court was in error in this ruling.

In *State v. Haley*, a defendant was sitting on his back deck shooting a B-B gun when a person passing in the area behind the deck saw the defendant and fled. The state convicted the defendant of intimidation with a deadly weapon under RCW 9.41.270 and he appealed, arguing that RCW 9.41.270(3)(a) prohibited his conviction because he was "in his place of abode" at the time of the alleged offense. This exception found in subsection (3)(a) states as follows:

> (3) Subsection (1) of this section shall not apply to or affect the following:
>
> (a) Any act committed by a person while in his or her place of abode or fixed place of business;

RCW 9.41.270(3)(a).

In addressing this argument, the court first gave the following rendition of facts:

> On the afternoon of April 9, 1981, Kevin was target practicing with a BB gun from the deck area at the rear of his family residence. The deck, which is attached to the home, is surrounded by a railing about 3 feet high on two sides and a privacy rail approximately 11 feet high on the remaining side. There is a swimming pool in the middle of the deck. The deck is accessible from the living and dining room areas, an overhead balcony attached to the home, as well as the back yard. The deck overlooks the Spokane River. Below the deck is a steep wooded hill with a tram down to the river. While Kevin was

> target practicing, 12-year-old Lisa Peltier and 13-year-old Timothy Forrester were out walking with Lisa's dog. The dog had wandered off and the two climbed a steep hill to retrieve it. They were walking back down the hill when Kevin heard their voices and inquired as to who was there. They answered, "It's us [sic]." He then informed them they were trespassers, on private property, the tram tracks were private and they had to get out of there. Lisa was on the tram tracks at the time. While Kevin was yelling at Lisa and Tim, he had the BB gun in his hand and was pointing it at the tram tracks. Lisa, frightened by the gun, turned and ran. She fell and severely injured her leg. Six months later Kevin was charged with intimidation with a dangerous weapon. On February 18, 1982, he was found guilty. He appeals.

State v. Haley, 35 Wn.App at 97.

Based upon the configuration of the deck, the court found that it constituted an "extension" of the defendant's abode such that the defendant was still "in . . . his place of abode" although out on the deck. The court's holding was as follows:

> The Legislature did not define the words "place of abode" used in this statute. In the absence of a statutory definition, the words used are given their ordinary and usual meaning. The ordinary meaning of abode is: one's home, place of dwelling, residence, and/or domicile. ***From the description given of the deck and its surroundings***, and in light of the rule that criminal statutes are to be construed strictly against the State and in favor of the accused, we hold the deck was an extension of the dwelling and therefore a part of the abode. Thus, the court erred in refusing to apply the exception.

State v. Haley, 35 Wn.App at 98 (citations omitted; emphasis added).

As the emphasized portion of the court's ruling indicates, particularly in light of the court's careful description of the deck, it is clear that the court's ruling that the defendant met the "in his abode" exception RCW

9.41.270(3)(a) was highly fact specific. The court's holding does not stand for the proposition that all porches or decks are part of a person's abode such that a defendant's location on the porch places them "in the abode" for the purposes of RCW 9.41.270(3)(a). Thus, in the case at bar, the trial court erred when it ruled that the defendant's location on his back porch placed him within the exception found in RCW 9.41.270(3)(a) such that he was not entitled to a lesser included instruction on unlawful display of a firearm.

The trial court's failure to give the defendant's proposed lesser included instruction on unlawful display of a firearm was not only error, given that it was legally and factually available, it also caused prejudice to the defendant's case. This conclusion follows from the following evidence: (1) the defendant admitted holding the firearm but denied ever pointing it at the officers, (2) the officers were located behind cover such that it would have been difficult for the defendant to point the pistol at either officer had he even been able to see where they were, and (3) the officers themselves admitted that the lighting was such that the defendant was not able to see them or where they were. Under these facts, there is a high likelihood that the jury would have rejected the second degree assault charges in favor of the lesser included offense had they been given the opportunity. As a result, this court should vacate the defendant's convictions for second degree assault and remand for a new trial in which the defendant would be entitled to lesser included offense

instructions.

III. THE TRIAL COURT VIOLATED RCW 9.94A.701(9) WHEN IT IMPOSED SENTENCES ON COUNT I AND II THAT EXCEEDED THE STATUTORY MAXIMUM FOR EACH OFFENSE.

Under RCW 9.94A.701(9), the trial court may not impose a determinative sentence of incarceration and a term of community custody if the combination of the two exceeds the statutory maximum for the given offense. Rather, the court must reduce the term of community custody so as to avoid exceeding the statutory maximum. This provisions states:

> (9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9).

In the past, a number of courts have attempted to avoid the impact of this provision in cases in which the imposition of community custody in light of the incarceration time imposed exceeded the statutory maximum by noting on the judgment and sentence that "in no circumstances may the defendant's time in custody when added to the community custody exceed the statutory maximum for the offense." However, in *State v. State v. Boyd,* 174 Wn.2d 470, 275 P.3d 321 (2012), the Washington Supreme Court rejected this approach and held that under RCW 9.94A.701(9), the term of incarceration added to the community custody time stated in the judgement and sentence

could not exceed the statutory maximum for the particular offense, regardless of the fact that a defendant's accrual of good time might well put the total of incarceration and community custody under the particular statutory maximum.

In the case at bar, the jury convicted the defendant in Counts I and II of Second Degree Assault under RCW 9A.36.021. Subsection (2) of this statute states:

> (2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
>
> (b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.021(2).

Since the charges in this case did not involve a finding of sexual motivation, they are both class B felonies under RCW 9A.36.021(2)(a). Under RCW 9A.20.021(1)(b), the maximum penalty for a class B felony is 10 years in prison plus a $20,000.00 fine. In spite of this limitation, the court in this case imposed 120 months on Counts I and II plus 18 months community custody. Since this exceeded the statutory maximum of 120 months, the trial court in this case violated RCW 9.94A.701(9). As a result, this court should remand this case to the trial court with instructions to strike the term of community custody.

CONCLUSION

This court should reverse the defendant's convictions for second degree assault and unlawful possession of a firearm based upon the court's failure to give a requested lesser included instruction and based upon the court's acceptance of a stipulation to which the defendant did not assent. In the alternative, this court should vacate the community custody portion of the defendant's sentences in Counts I and II.

DATED this 29th day of November, 2012.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9.41.270

(1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

(2) Any person violating the provisions of subsection (1) above shall be guilty of a gross misdemeanor. If any person is convicted of a violation of subsection (1) of this section, the person shall lose his or her concealed pistol license, if any. The court shall send notice of the revocation to the department of licensing, and the city, town, or county which issued the license.

(3) Subsection (1) of this section shall not apply to or affect the following:

(a) Any act committed by a person while in his or her place of abode or fixed place of business;

(b) Any person who by virtue of his or her office or public employment is vested by law with a duty to preserve public safety, maintain public order, or to make arrests for offenses, while in the performance of such duty;

(c) Any person acting for the purpose of protecting himself or herself against the use of presently threatened unlawful force by another, or for the purpose of protecting another against the use of such unlawful force by a third person;

(d) Any person making or assisting in making a lawful arrest for the commission of a felony; or

(e) Any person engaged in military activities sponsored by the federal or state governments.

RCW 9.94A.701

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507; or

(b) A serious violent offense.

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

(a) Any crime against persons under RCW 9.94A.411(2);

(b) An offense involving the unlawful possession of a firearm under RCW 9. 41.040, where the offender is a criminal street gang member or associate;

(c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; or

(d) A felony violation of RCW 9A.44.132(1) (failure to register) that is the offender's first violation for a felony failure to register.

(4) If an offender is sentenced under the drug offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.660.

(5) If an offender is sentenced under the special sex offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.670.

(6) If an offender is sentenced to a work ethic camp, the court shall impose community custody as provided in RCW 9.94A.690.

(7) If an offender is sentenced under the parenting sentencing alternative, the court shall impose a term of community custody as provided in RCW 9.94A.655.

(8) If a sex offender is sentenced as a nonpersistent offender pursuant to RCW 9.94A.507, the court shall impose community custody as provided in that section.

(9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9A.36.021
Assault in the Second Degree

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. FRED DURGELOH, Appellant.	NO. 43188-2-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On November 29TH, 2012, I personally placed in the United States Mail and/or E-filed the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT

SUE BAUR COWLITZ CO PROS ATTY 312 SW. FIRST AVE. KELSO, WA 98626	FRED DURGELOH - #356366 STAFFORD CREEK CORR CTR. 191 CONSTANTINE WAY ABERDEEN, WA 98520

Dated this 29TH day of November, 2012, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

HAYS LAW OFFICE

November 29, 2012 - 3:06 PM

Transmittal Letter

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Case Name: State vs. Durgeloh

Court of Appeals Case Number: 43188-2

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